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HOUSE OF REPRESENTATIVES
REPORT
101-123

TELEVISION VIOLENCE ACT OF 1989

JULY 7, 1989.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. BROOKS, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 1391]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1391) to exempt from the antitrust laws certain activities relating to alleviating the negative impact of violence in telecast material, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Television Violence Act of 1989".

SEC. 2. DEFINITIONS.

For purposes of this Act—

(1) the term "antitrust laws" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that such time includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition;

(2) the term "person in the television industry" means a television network, any entity which produces programming (including theatrical motion pictures) for telecasting or telecasts programming, the National Cable Television Association, the Association of Independent Television Stations, Incorporated, the National Association of Broadcasters, the Motion Picture Association of America, the Community Antenna Television Association, and each of the networks' affiliate organizations, and shall include any individual acting on behalf of such person; and

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(3) the term "to telecast" means—
(A) to broadcast by a television broadcast station; or
(B) to transmit by a cable television system or a satellite television distribution service.

SEC. 3. EXEMPTION.

The antitrust laws shall not apply to any joint discussion, consideration, review, action, or agreement by or among persons in the television industry for the purpose of, and limited to, developing and disseminating voluntary guidelines designed to alleviate the negative impact of violence in telecast material.

SEC. 4. LIMITATIONS.

(a) BOYCOTTS.—The exemption provided in section 3 shall not apply to any joint discussion, consideration, review, action, or agreement which results in a boycott of any person.

(b) TIME PERIOD.—The exemption provided in section 3 shall apply only to any joint discussion, consideration, review, action, or agreement engaged in only during the 3-year period beginning on the date of the enactment of this Act.

I. PURPOSE OF H.R. 1391

H.R. 1391 is a response to concerns about the negative impact of violence on television. The purpose of H.R. 1391 is to remove a possible impediment—the antitrust laws—for a limited time should persons in the television industry voluntarily wish to meet and adopt voluntary guidelines in this area. The bill is not meant to coerce any conduct or action whatsoever. Whether or not persons wish to meet as permitted by the bill, or whether or not they wish to develop or abide by guidelines, is entirely voluntary.

II. PROCEDURAL BACKGROUND OF H.R. 1391

On March 14, 1989, Congressmen Dan Glickman and Edward Feighan introduced H.R. 1391, legislation to grant a 3-year antitrust exemption to permit persons in the television industry to engage in certain joint voluntary action to develop and disseminate voluntary guidelines designed to alleviate the negative impact of violence in telecast material.[1]

On May 10, 1989, the Subcommittee on Economic and Commercial Law held a hearing on H.R. 1391. Witnesses testifying in support of the legislation were: Senator Paul Simon of Illinois (sponsor of similar legislation in the Senate), Dr. William Dietz on behalf of the American Academy of Pediatrics, Dr. Brian Wilcox on behalf of the American Psychological Association, and Ms. Joan Dykstra on behalf of the National Parent-Teacher Association.

Ms. Beth Waxman Bressan of CBS Broadcast Group testified that CBS neither actively supported nor actively opposed the bill and thought it was unnecessary. Mr. Alan Gerson of the National Broadcasting Company testified that NBC did not oppose the bill but thought it was unnecessary as applied to over-the-air television. Mr. Alfred R. Schneider of Capital Cities/ABC, Inc. testified that ABC did not support the bill because "jointly-developed industry-wide standards to replace those which have been independently arrived at would in our judgment be unnecessary, inappropriate, and exceedingly difficult to implement." [2]

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[1] In the 100th Congress, Congressmen Glickman and Feighan introduced a similar bill, H.R. 3848, on which the Subcommittee on Monopolies and Commercial Law held a hearing on October 5, 1988.

[2] Written Statement of Alfred R. Schneider at p. 4.

Professor Cass R. Sunstein of the University of Chicago Law School testified to his belief that H.R. 1391 was constitutional. Mr. Barry W. Lynn testified in opposition to the bill on behalf of the American Civil Liberties Union, presenting the ACLU's view that the antitrust exemption in the bill "is both unwise and unconstitutional." [3]

On June 15, 1989, the subcommittee adopted one clarifying amendment to the bill, offered by Mr. Glickman, and favorably reported the bill as an amendment in the nature of a substitute by a 10 to 4 vote. The amendment was intended to clarify the sponsors' intent that all entities that air or produce programming would fall within the ambit of the bill's coverage.

On June 20, 1989, the Committee on the Judiciary ordered the amendment in the nature of a substitute to H.R. 1391 favorably reported, by a vote of 26 to 8.

III. Background and Summary of H.R. 1391

A. Effects of TV Violence on Real Life Violence

H.R. 1391 is based upon the premise that there is a causal relationship between violence on television and aggressive behavior in real life, particularly with young viewers. The bulk of the scientific research into this area seems to indicate that there is some link between television violence and real life aggression. Though there is not universal acceptance of this conclusion—a minority of studies have reached the opposite conclusion—the committee, relying upon the greater weight of the research, accepts the premise that there is some causal relationship between violence on television and real life aggression.

A brief summary of some of the research in this area follows:

1. *Surgeon General's Advisory Committee on Television and Behavior.*—Pursuant to a request by Senator John Pastore in 1969, this Advisory Committee was appointed under the auspices of the National Institute of Mental Health to study whether there was a causal connection between television violence and real life violence and anti-social behavior. Numerous research studies were funded and conducted, and in 1972 the Surgeon General's Report, *Television and Growing Up: The Impact of Televised Violence,* was published. The report's major conclusion was as follows:

> [T]here is a convergence of the fairly substantial experimental evidence for a short-run causation of aggression among some children by viewing violence on the screen and much less certain evidence from field studies that extensive violence viewing precedes some long-run manifestations of aggressive behavior. The convergence of the two types of evidence constitute some preliminary indication of a causal relationship, but a good deal of research remains to be done before one can have confidence in these conclusions.

The report acknowledged that these conclusions were tentative and limited, and were therefore not entirely satisfactory.

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[3] Written Statement of Barry W. Lynn at p. 1.

Ten years later, an update of the Surgeon General's Report was issued by the National Institute of Mental Health (*Television and Behavior: Ten Years of Scientific Progress and Implications for the 80's*). The update considered the research that had been conducted since the original study, and stated that "[r]ecent research confirms the earlier findings of a causal relationship between viewing televised violence and later aggressive behavior." [4] This conclusion applied to groups, rather than specific types of individuals. Importantly, the update also stated:

> [N]o single study unequivocally confirms the conclusion that televised violence leads to aggressive behavior. Similarly, no single study unequivocally refutes that conclusion. The scientific support for the causal relationship derives from the convergence of findings from many studies, the great majority of which demonstrates a positive relationship between televised violence and later aggressive behavior.[5]

2. *Huesman Longitudinal Study.*—Dr. L. Rowell Huesman, a scientist who has spent many years researching the effects of television violence on behavior, wrote an article for the 1982 NIMH update in which he stated that "[a]t this time, it should be difficult to find any researcher who does not believe that a significant positive relationship exists between viewing television violence and subsequent aggressive behavior under most conditions." [6]

Dr. Huesman, along with other colleagues, also conducted a longitudinal study in which the same children were studied first in 1960 at age 8, and then later at ages 22 and 30 (632 persons were studied at all three ages). The researchers concluded that, in boys, "a preference for TV violence viewing at age 8 is related to both current aggressive behavior and later aggressive behavior including criminal behavior as an adult", while for girls, there was no relation between a preference for violent shows and aggression at ages 8 or 19, "but a slight relation between violence viewing and aggression at age 30." [7]

3. *Gerbner Prevalence of Violence Studies.*—Dr. George Gerbner, Dean of the Annenberg School of Communications at the University of Pennsylvania, has led a team of researchers that has been analyzing the level of violence in television programs for each television season since 1967. One of the measures studied has been the rate of clear-cut and unambiguous episodes of physical violence. For the year 1985, the latest year for which results have been released, Dr. Gerbner's team found the following number of violent acts to have been committed in an hour of television during the specified period: [8]

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[4] *Television and Behavior: Ten Years of Scientific Progress and Implications for the 80's,* Volume 1: Summary Report, Page 89 (1982).

[5] *Id.* at 89–90.

[6] "Television Violence and Aggressive Behavior", p. 126, included in *Television and Behavior: Ten Years of Scientific Progress and Implications for the 80's,* Volume 2: Technical Reviews (1982).

[7] Huesman, Eron, et al., "Television Viewing Habits in Childhood and Adult Aggression," p. 9.

[8] Gerbner, Gross, Signorielli and Morgan "Television's Mean World: Violence Profile No. 14–15" (September, 1986).

(a) All programs on all networks: 9.7 violent acts in an average television hour.

(b) Between 8 and 9 p.m., in what use to be called the family hour: 7.6 violent acts per hour.

(c) Between 9 p.m. and 11 p.m.: 6.4 violent acts per hour.[9]

(d) Weekend-Daytime TV (children's programming, largely cartoons): 21.3 violent acts per hour.

Dr. Gerbner's team found that, in 1985, 85 percent of all programs on television contained some act of violence.

The 1985 study contended that viewers of violence, especially viewers who belong to the same group as the most prevalent victims of TV violence—women, young children, and the elderly—tend to identify symbolically with the victims ot TV violence and translate this into real fear. The study stated that:

> While the convergence of research indicates that exposure to violence does occasionally incite and often desensitize, our findings show that, for most viewers, television's mean and dangerous world tends to cultivate a sense of relative danger, mistrust, dependence, and—despite its supposedly "entertaining nature"—alienation and gloom.[10]

4. *Attorney General's Task Force on Family Violence.*—In a report issued in September 1984, the Attorney General's Task Force on Family Violence stated that "the evidence is becoming overwhelming that just as witnessing violence in the home may contribute to normal adults and children learning and acting out violent behavior, violence on TV and the movies may contribute to the same result." [11]

5. *Conflicting Research on Television Violence.*—As indicated, not all of the studies and literature support a finding that there is some relationship between television violence and real life aggression. For example, the National Broadcasting Company sponsored a study of the effect of exposure to violence on television on aggressive behavior.[12] Exposure to television violence and aggressive behavior among elementary school boys and girls, and among teenage boys, was measured in different schools in two cities, on five (for teenage boys) or six (for elementary school boys and girls) different occasions between 1970 and 1973. Where possible, the same students were tracked over the course of this three-year period. The study "did not find evidence that television violence was causally implicated in the development of aggressive behavior patterns among children and adolescents over the time periods studied." [13]

The committee is persuaded by the majority of studies that indicate there is some relationship between television violence and real life behavior. The committee is therefore concerned about violence on television and its effects. H.R. 1391 addresses the problem of the

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[9] It is noteworthy that the level of violence was higher in the early evening, in what used to be the family hour, than it was in the later evening.

[10] "Televisions' Mean World" *supra*, p. 10.

[11] Attorney General's Task Force on Family Violence, Final Report, September, 1984, p. 110.

[12] Milavsky, Kessler, Stipp, & Rubens, *Television and Aggression: A Panel Study*, 1982.

[13] *Id.* at page 487.

impact on our Nation's children of violence on television; as formulated, the bill is a limited, narrow, non-coercive response. Television programmers who may wish to take steps to unilaterally alleviate the negative impact of television violence but who do not do so for fear of slipping in the ratings will be able to participate in joint discussions about voluntary guidelines.

IV. Constitutional Issues Raised by H.R. 1391

The committee believes that H.R. 1391 presents no constitutional problems. It is a bill that mandates nothing and is completely voluntary. It neither contains nor is meant to imply any sanctions for either failure to meet and hold discussions as permitted by the bill or failure to adhere to any voluntary guidelines that may be developed. The antitrust exemption in the bill is not intended to coerce the industry to either meet or adopt television violence guidelines; it is only intended to remove a possible impediment—the antitrust laws—should members of the industry voluntarily wish to meet and adopt guidelines in this area.[14]

The committee believes that H.R. 1391 contains no constitutional infirmities. The bill is entirely voluntary and is reasonably designed to protect impressionable viewers from "developmental" harm. As Professor Cass R. Sunstein of the University of Chicago Law School told the Subcommittee on Economic and Commercial Law at its hearing:

> H.R. 1391 does not regulate speech. Its only effect is to authorize voluntary action by broadcasters. In this respect, it increases rather than decreases their freedom, by reducing the pressures of the marketplace with respect to television violence. The most powerful attack on the bill would be that the selective exemption it creates is based on the content of speech, and that content-based regulation is subject to careful judicial scrutiny. This attack is, however, unpersuasive in light of the fact that H.R. 1391 (a) is limited to the broadcasting area, (b) does not require or prohibit speech at all, and (c) does not discriminate on the basis of point of view, but is instead a legitimate effort to [combat] genuine harms.

H.R. 1391 is not an effort to regulate a point of view but is, rather, an effort to prevent a legitimate harm.

The bill's efforts to reduce the negative impact of violence has some similarities to the factual situation presented in *Ginsberg* v. *New York*,[15] though the speech involved in *Ginsberg* was pornography, which, unlike violent speech, is not entitled to First Amendment protections. In *Ginsberg*, the Supreme Court upheld a New York statute that prohibited the sale of pictures or magazines depicting nudity harmful to minors to persons under seventeen years of age. At the time the statute was enacted, there existed scientific

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[14] In this regard, H.R. 1391 is entirely different from the situation in *Writers Guild* v. *ABC*, 609 F. 2d 355 (9th Cir. 1979), where the government, through the Federal Communications Commission, was found to have exerted infomal, improper pressure on networks to adopt family viewing guidelines.

[15] 390 U.S. 629 (1968)

studies that concluded exposure to obscenity impaired the development of youth, as well as studies that claimed such exposure did not hinder development. Nevertheless, the Court said "we do not demand of legislatures scientifically certain criteria of legislation."[16] It acknowledged the interest of the government in protecting the welfare of children and safeguarding them from abuses that might hinder children's development. Since the action of the legislature had a rational relation to the objective of safeguarding minors from harm, the statute was upheld.

The Supreme Court has upheld some governmental regulation of broadcasting because of the often uncontrolled or involuntary exposure of children to television, and because of the limited number of airwaves that exist. In *Federal Communications Commission* v. *Pacifica Foundation,* for example, the Court recognized that "it is broadcasting that has received the most limited First Amendment protection."[17] The Court also indicated that "[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content."[18]

Given that there are not enough broadcast frequencies available to accommodate all parties who want to broadcast, the Supreme Court stated in *Red Lion Broadcasting* v. *FCC* in 1969 that "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." [19] While the weight of this pronouncement may be somewhat less now because of the recent proliferation of cable and satellite television systems [20] the Government's interest in protecting children from abuse is as strong as ever. In enacting H.R. 1391, the committee believes that it is acting in a reasonable, non-intrusive, non-coercive manner to try to prevent developmental harm to impressionable frequent viewers of television.[21]

V. Antitrust Consideration

H.R. 1391 would grant only a temporary exemption from the antitrust laws. It removes a possible impediment to persons in the television industry voluntarily getting together to develop voluntary guidelines to alleviate the negative impact of television violence.

The committee does not accept the argument that the antitrust laws now prohibit all joint activities contemplated by the legislation. Under existing law, many joint activities among competitors are not viewed as harmful to competition. Thus, trade associations

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[16] *Id.* at 643.

[17] 438 U.S. 726, 748 (1978). *Pacifica* dealt with a radio broadcast that was indecent, but not obscene, so the First Amendment did apply. *See Sable Communications,* v. *FCC,* —— U.S. ——, NO. 88-515, June 23, 1989.

[18] *Id.*

[19] 395 U.S. 367, 388 (1969).

[20] The Committee's understanding, though, is that even with cable and satellite transmissions, the number of operators and transmissions could be limited by the size of the C-band and K-band spectrums and the size of the microwave spectrum. Given this, the Court's statement in *Red Lion Broadcasting* would still have some merit.

[21] In no way does the legislation restrict adults to viewing only what is acceptable for children. The legislation contains no restrictions or bans whatsoever. Cases such as *Butler* v. *Michigan,* 352 U.S. 380 (1957) and the recently decided *Sable Communications* v. *FCC,* —— U.S. ——, No. 88-515, June 23, 1989, that cite this proposition are therefore inapplicable.

and industry-wide groups have met for years in order to discuss common problems, to develop standards to improve the safety of the products and even to conduct joint research and development. Because such activities are generally not aimed at restricting competition or decreasing output, but instead are directed at improving competitiveness and efficiencies, the antitrust laws are not needed to restore the operation of a free market economy.[22]

The committee does not believe that the decision in *U.S.* v. *National Association of Broadcasters* [23] can be read as prohibiting all joint voluntary agreements in the broadcast industry. In *NAB,* the district court struck down participation by broadcasters in a voluntary code in which there was industry-wide adherence to a rule prohibiting multiple products from being advertised during a single commercial. The court found the multiple product standard to be an artificial device aimed at ernhancing the demand for commercial time and/or limiting the supply of commercial time available. Finding the effect to be similar to a tying arrangement, the court found the practice to be a *per se* violation of the antitrust laws. This particular rule was anti-competitive. Other parts of the NAB code were not viewed as anti-competitive, however, and were not invalidated. The committee does not believe that joint, voluntary agreements that are not anti-competitive in their effect, and that do not give rise to ancillary restraints, raise antitrust problems.

Having said this, the committee acknowledges that the antitrust laws are still perceived by some as an impediment to persons in the television industry developing joint voluntary guidelines. Because of its interest in protecting impressionable viewers from abuse, the committee is willing to approve the *limited, temporary,* exemption in H.R. 1391 so that if persons in the television industry wish to voluntarily develop guidelines to reduce the negative impact of television violence, they will not be dissuaded from doing so by possible fears about antitrust exposure.

Perhaps most important, the legislation makes it clear that the antitrust exemption does *not* apply to any joint discussion, consideration, review, action, or agreement which results in a boycott of any person. The exemption is meant only to permit development of voluntary guidelines to alleviate the negative impact of violence on television, not to be used as a subterfuge for a boycott of any person because of adherence to the guidelines developed.

VI. Section-by-Section Analysis

Section 1 contains the short title of the bill, the "Television Violence Act of 1989."

Section 2 defines the term used in the bill. "Antitrust laws" are defined to include those Federal statutes that prohibit restraints of trade and unfair competition. The statutory meaning of antitrust laws contained in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12 (a)) is adopted. The term antitrust laws is also defined to include section 5 of the Federal Trade Commission Act (15

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[22] *See e.g., Broadcast Music Inc.* v. *CBS,* 441 U.S. 1 (1979); *Continental TV* v. *GTE Sylvania Inc.,* 433 U.S. 36 (1977).

[23] 536 F. Supp. 149 (D. D.C. 1982).

U.S.C. 45) to the extent that such section applies to unfair methods of competition.

The term "person in the television industry" is defined. This term is important because it defines who is included within the scope of the bill. A person in the television industry is meant to be any entity that produces or airs (whether by television braodcast, cable television transmission or satellite television transmission) programming; as used here, programming includes theatrical motion pictures. Specific industry-wide organizations are also listed and included as persons in the television industry, since their input might be helpful to any joint voluntary discussions. The organizations specifically listed include the National Cable Television Association, Association of Independent Television Stations, Inc., National Association of Broadcasters, Motion Picture Association of America, and Community Antenna Television Association. The television networks and their affiliates are included. Any individual acting on behalf of a person in the television industry would also be considered a person in the television industry for purpose of the legislation.

The definition of "person in the television industry" for purposes of this bill is meant to be read in the alternative (certain entities will probably qualify under more than one alternative). In other words, a person in the television industry would include a television network, on an entity which produces programming (including theatrical motion pictures) for telecasting, or an entity which telecasts programming, or an organization specifically identified in the bill, or a network's affiliate organization, as well as any individual acting on behalf of a person covered within one of these alternatives.

The term "to telecast" is defined to mean broadcasting by a television station, or transmitting be a cable television station or a satellite television distribution service.

Section 3 of the bill sets forth the scope of the narrow antitrust exemption granted. The antitrust laws will not apply to any joint discussion, consideration, review, action, or agreement by or among persons in the television industry for the purpose of developing and disseminating voluntary guidelines designed to alleviate the negative impact of violence in telecast material. The exemption is specifically limited to this purpose of developing and disseminating such voluntary guidelines. The exemption is not intended to coerce any specific or general conduct. Rather, it is granted for the purpose of removing a possible impediment to development of joint voluntary guidelines by persons in the television industry.

Section 4 sets forth the limitations of the antitrust exemption contained in section 3 of the bill. The exemption shall not apply to any joint discussion, consideration, review, action, or agreement which results in a boycott of any person. This is to ensure that the joint activity surrounding the development of guidelines is solely for the purpose of alleviating the negative impact of violence in telecast material, and is not undertaken as a subterfuge, either purposefully or otherwise, for boycotting any person.

Subsection (b) of section 4 contains the time limitation for the exemption in section 3. The exemption shall apply only to a joint discussion, consideration, review, action, or agreement entered into

during the 3-year period beginning on the date of the enactment of the bill into law.

VII. Information Submitted Pursuant to Rules

A. INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the committee estimates that this bill will not have an inflationary impact on prices and costs in the operation of the national economy.

B. OVERSIGHT

This committee exercises oversight responsibilities with respect to the antitrust laws of the United States. No findings or recommendations of the Committee on Government Operations were received as referred to in rule XI, clause 2(l)(3)(D).

C. COST

Pursuant to clause 7 of rule XIII of the Rules of the House of Representatives, the committee states that it concurs with the estimate submitted by the Congressional Budget Office as set forth below.

D. BUDGET STATEMENT

Pursuant to clause 2(l)(3)(B) and (C) of rules XI of the rules of the House of Representatives, the following estimate was prepared by the Congressional Budget Office and submitted to the committee.

U.S. Congress,
Congressional Budget Office,
Washington, DC, June 22, 1989.

Hon. Jack Brooks,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

Dear Mr. Chairman: the Congressional Budget Office has reviewed H.R. 1391, the Television Violence Act of 1989, as ordered reported by the House Committee on the Judiciary, June 20, 1989. We estimated that no cost to the federal government or to state or local governments would result from enactment of this bill.

H.R. 1391 would enable television networks and their affiliate organizations, entities that produce programming for telecasting or telecast programming, and certain organizations associated with the television industry to meet and consider establishing voluntary guidelines designed to alleviate the negative impact of violence in telecast material without being subject to antitrust laws. The exemption would be for a period of three years, and would not apply to any action that results in a boycott of any person.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mitchell Rosenfeld, who can be reached at 226-2860.

Sincerely,

Robert D. Reischauer.

DISSENTING VIEWS OF HON. DON EDWARDS, HON. ROBERT W. KASTENMEIER, HON. JOHN CONYERS, JR., HON. PATRICIA SCHROEDER, HON. GEO. W. CROCKETT, HON. MIKE SYNAR, HON. HOWARD L. BERMAN, AND HON. RICK BOUCHER

As Justice Brennan stated so eloquently in *Bantam Books, Inc.* v. *Sullivan* [1]: "It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments." [2] H.R. 1391 is just such an encroachment.

Along with the *Bantam Books* Court, we believe freedom of speech is a precarious, fragile freedom which must be guarded jealously and diligently. Thus, we must dissent from the Committee Report on H.R. 1391.

Proponents of H.R. 1391 have cited *Red Lion Broadcasting Co.* v. *FCC,*[3] *Ginsberg* v. *New York,*[4] *and FCC* v. *Pacifica Foundation* [5] as supportive of their position that the bill does not violate the First Amendment. H.R. 1391 is readily distinguishable from narrow regulations previously upheld by the Supreme Court.

H.R. 1391 deals with televised violence. The Court has never suggested that depictions of violence lie outside the full protection of the First Amendment. Rather, the cases relied on by the majority deal primarily with the area of obscenity, an area never viewed by the Court as within the concerns of the First Amendment. As the Court stated in *Roth* v. *United States* [6]: "Obscenity is not within the area of constitutionally protected speech or press." [7]

Even in the unprotected area of obscenity, the Court has always required the government to regulate in a manner protective of constitutionally protected speech. "Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards * * * is * * * but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks." *(Bantam Books, Inc.* v. *Sullivan.)*[8]

In contrast, H.R. 1391 operates in a protected area of speech and it manipulates the federal antitrust laws to achieve an impermissible result. The bill exempts the TV industry from the antitrust laws for the express purpose not only of having that industry alter the content of its programs, but also to alter it in the direction the government dictates. That is indirect censorship, clear and simple.

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[1] 373 U.S. 58
[2] *Id.* at 66
[3] 395 U.S. 367
[4] 390 U.S. 629
[5] 438 U.S. 726
[6] 354 U.S. 476
[7] *Id.* at 485
[8] 372 U.S. 58, 66

Further, as the *Bantam Books* Court pointed out, "People do not lightly disregard public officers' thinly veiled threats to institute * * * proceedings against them if they do not come around." [9] The legislative history of H.R. 1391 is replete with thinly veiled threats of further government action.

In *Red Lion Broadcasting* v. *F.C.C.*,[10] the Court merely upheld the Federal Communications Commission's "Fairness Doctrine". This doctrine, as the name implies, requires the presentation of differing viewpoints. The Court upheld the fairness doctrine in this case because it "enhance[d] rather than abridge[d] the freedoms of speech and press protected by the First Amendment * * *" [11]

In contrast, H.R. 1391 seeks to restrict or eliminate particular viewpoints about the appropriate use of violence. Yet, the Court has said: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."[12]

The Court in *F.C.C.* v. *Pacifica Foundation* [13] upheld possible administrative sanctions against a radio station for broadcasting "indecent" material in the early afternoon. The Court noted this would "deter only the broadcasting of patently offensive reference to excretory and sexual organs and activities" which "surely lie at the periphery of First Amendment concerns." [14] In this case, the FCC pointed out that it "never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it." [15]

As the *Pacifica* Court emphasized, "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." [16] In its decision, the Court merely recognized that certain sexually-oriented speech historically has been outside the protection of the First Amendment, particularly if distributed to minors.

In *Ginsberg* v. *New York*,[17] the Court upheld a prohibition on sale to minors of material which was "obscene" as to children, even if not legally "obscene" for adults. The Court was careful to point out that the prohibition did not limit the rights of adults to the same material, and that parents desiring to purchase the magazines for themselves or for their children were *not* barred from doing so.

Rather than according with previous Supreme Court decisions, the practical effect of H.R. 1391 is to reach the result forbidden by the Supreme Court in *Butler* v. *Michigan*,[18] that of reducing the adult population to seeing only what is fit for children: "We have before us legislation not reasonably restricted to the evil with

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[9] *Id.* at 68
[10] 395 U.S. 367 (1969)
[11] *Id.* at 375
[12] *Id.* at 390 quoting *Associated Press* v. *United States*, 326 U.S. 1, 20
[13] 438 U.S. 726.
[14] *Id.* 743.
[15] *Id.* at 733.
[16] *Id.* at 746.
[17] 390 U.S. 629.
[18] 352 U.S. 380.

which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children."[19]

The sincere motivations of the proponents of H.R. 1391 are not questioned here. All of us support the goal of a more civil society. But casting aside constitutional concerns and giving content-specific antitrust exemptions to the TV industry is a truly dangerous and constitutionally-precluded way to achieve that goal.

The words of Justice Brennan in *Pacifica*[20] are particularly salient to H.R. 1391: "Most parents will undoubtedly find understandable as well as commendable the Court's sympathy with the FCC's desire to prevent offensive broadcasts from reaching the ears of unsupervised children. Unfortunately, the facial appeal of this justification for radio censorship masks its constitutional insufficiency."[21]

The proper place for TV programming content to be decided is in our homes and our communities. As Justice Douglas pointed out in *Ginsberg*,[22] "It is one thing for parents and the religious organizations to be active and involved. It is quite a different matter for the state to become implicated as a censor."[23] When Congress "signals" to the media what material it deems appropriate, that is informal censorship by the government; and, as such, it can have the same constitutionally impermissible effect as direct restraints on inhibiting communication.[24]

S. 593, the Senate companion bill, like H.R. 1391 began with an exemption for violence, but passed the Senate with exemptions for violence, illegal drug use, and sexually explicit material. The action of the Senate demonstrates that once this process is engaged in, there is no rational basis for stopping at any particular point.

When they are inclined to do so, power regularly is exercised by our citizens to affect television content. The American people can directly control programming without the interference of the government, and that is how it should be.

The Court has in the past "look[ed] through forms to the substance and recognize[d] that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief."[25] Should the Congress proceed in its ill-advised path with H.R. 1391, we can only hope that the Court will do so once again,

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[19] *Id.* at 383.
[20] *F.C.C.* v. *Pacificia Foundation*, 438 U.S. 726.
[21] *Id.* at 767, Brennan, J., dissenting.
[22] *Ginsberg* v. *New York*, 390 U.S. 629.
[23] *Id.* at 655, Douglas, J., dissenting.
[24] See *Bantam Books* v. *Sullivan* 372 U.S. 58.
[25] *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 67.

for it is not only a serious mistake—but also constitutional error—to encourage censorship through the manipulation of the federal antitrust laws.

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ADDITIONAL DISSENTING VIEWS OF HON. ROBERT W. KASTENMEIER

I join in the dissent of my colleague from California, Don Edwards. I agree that the First Amendment prohibits the Congress from passing a law that, even indirectly, requires that television broadcasters make available to the public only certain kinds of television programming. I agree that there is such a requirement, at least implicitly, in H.R. 1391, which suspends the antitrust laws to permit those broadcasters to meet and discuss ways to reduce television violence.

I share the concerns of my colleague from Kansas, Dan Glickman, and the Senator from Illinois, Paul Simon, who have through this legislation expressed their disapproval of television violence, and their desire to curtail the broadcast media's current programming practices. It is readily apparent that the amount of television violence is steadily increasing, and that this is a causal factor in the amount of violence in the society at large. I recognize that H.R. 1391 represents a well-intentioned effort to combat this situation, and despite my belief that it is unconstitutional, I applaud those intentions.

Although the Government may be constitutionally prohibited from imposing programming content on the broadcast media, the public is not similarly disabled. The efforts of individuals and organized private groups to dissuade businesses from advertising on certain offensive programs, and broadcasters from showing such programs, have often been successful, and much credit is due them. Whether or not H.R. 1391 is enacted into law, I encourage these efforts, and hope that they will continue.

By joining in the dissent of my colleague from California, I do not yield in my opposition to television violence. In balancing these competing concerns, however, I conclude that the First Amendment requires my opposition to H.R. 1391.

ROBERT W. KASTENMEIER.

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